

College of Osteopathic Medicine and Surgery, Petitioner and College of Osteopathic Medicine and Surgery Faculty Federation, Local 3474, American Federation of Teachers, Case 18-UC-113

November 2, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS ZIMMERMAN AND HUNTER

Upon a petition duly filed by the Employer under Section 102.60 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, to clarify the existing bargaining unit, a hearing was held before Hearing Officers Richard R. Anderson and David M. Biggar. Subsequently, pursuant to Section 102.67 of the Board's Rules, the Regional Director for Region 18 transferred this proceeding to the Board for decision. Thereafter, the Employer (herein called the College or COMS) and the Union filed briefs with the Board which have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officers' rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is a nonprofit Iowa corporation with its offices and principal place of business located in Des Moines, Iowa, where it is engaged in the operation of a medical college. The parties stipulated, and we find, that during the past calendar year, a representative period, the Employer's gross volume of business was in excess of \$1 million. During the same period, the Employer purchased goods and services valued in excess of \$10,000 which were shipped to its Des Moines facility directly from points located outside the State of Iowa. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. College of Osteopathic Medicine and Surgery Faculty Federation, Local 3474, American Federation of Teachers, is not a labor organization within the meaning of Section 2(5) of the Act.¹

¹ In light of our finding, *infra*, that the faculty members in the unit are managerial employees, and since it appears that the unit is comprised solely of the managerial employees involved herein, we find that the Union does not represent statutory employees and therefore is not a labor

3. Pursuant to a representation election, the Union was certified on January 23, 1976, as the exclusive bargaining representative in the following unit:²

All full-time and regular part-time clinical and pre-clinical faculty, student faculty and librarians employed by the Employer at its facilities including clinics in the Des Moines, Iowa area; excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

Thereafter, the parties negotiated a collective-bargaining agreement which was effective from December 7, 1976, through June 30, 1978. On October 18, 1978, the parties entered into a successor agreement effective July 1, 1978, through June 30, 1981. On February 5, 1981, the College filed the instant petition.

The petition seeks to clarify the unit to exclude all employees who are currently included therein, and requests that the Board revoke the Union's certification accordingly. The College contends that the faculty unit consists solely of managerial employees as defined in the Supreme Court's decision in *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980), and that these employees are not entitled to the benefits of collective bargaining under the National Labor Relations Act, as amended. The College urges, that, similar to the *Yeshiva* faculty, COMS faculty members formulate and effectuate the institution's academic policies and have significant input into essential nonacademic decisions.

Alternatively, the College asserts that, if the Board disagrees with the College's principal contention, then the appropriate unit should not include in any event the positions of discipline head, clinic director, director of biomedical communications, and library director, because these positions are supervisory.

The Union contends that the faculty members do not meet the criteria set forth in *Yeshiva* for managerial employee status. To the contrary, the Union asserts that the COMS administration has retained full authority for managerial decisionmaking. The Union alternatively contends that even if the Board finds that the faculty members are managerial employees, they should not lose the protection of the

organization within the meaning of the Act. See *Ithaca College*, 261 NLRB 577 (1982), at fn. 2.

² The record indicates that in 1972 the administration revoked the then-existing faculty manual and replaced it with a new one which contained a vastly different managerial structure which decreased authority for the faculty. During 1974-75, a faculty committee drafted a new manual, which was rejected by the administration because it provided for greater faculty job security than the administration favored. In 1975, several faculty members were terminated, provoking a dispute which culminated in litigation.

Act because the faculty's authority was gained solely through the collective-bargaining process.

The College is a privately supported institution which offers students a program leading to the degree of doctor of osteopathy (D.O.). This program involves an academic (preclinical) curriculum which is followed by student participation in various osteopathic clinics run by the College. Currently, this program encompasses 4 years.

The College is officially governed by a board of trustees, which meets twice annually. The board of trustees oversees a board of directors which has a more direct and active role in the College's affairs.³ Primary authority for the day-to-day administration of the College is held by the college president, a position in which Dr. Leonard Azneer has served since 1971. He is assisted primarily by the dean for academic affairs, currently Dr. Joseph Walsh, the assistant dean for preclinical affairs, the associate dean for clinical affairs, and the assistant dean for student affairs. The College's executive council also includes the assistant dean for admissions, the director of the library, the director of biomedical communications, the discipline heads, one elected representative of the clinic directors, and two faculty members elected at-large.

Pursuant to the 1976 collective-bargaining agreement, the faculty drafted a constitution and bylaws which were approved by the board of trustees. The faculty constitution provides for monthly meetings of the full-time faculty. Additionally, it established faculty committees to deal with a wide range of issues of concern to the College and the faculty. Several of these committees consist exclusively of voting members elected by the faculty.⁴ Other committees include administration appointees as well as elected faculty members.⁵ On most committees, one or more deans are members *ex officio*, but have no voting rights. The faculty president and the dean for academic affairs are *ex officio* members of all committees. The bylaws state that no faculty member may serve on more than one committee, unless every other member is on one.

The faculty is divided into various disciplines, which are analogous to departments at other insti-

tutions.⁶ Each discipline is led by a discipline head, who is chosen by the dean for academic affairs.

The College's curriculum is taught through an "integrated systems" approach. The bodily organ systems, e.g., respiratory, gastrointestinal, etc., are considered individually, with input from the various disciplines involved.⁷ The syllabus for each system is prepared annually under the direction of faculty members called co-secretaries, who are appointed by the dean for academic affairs.⁸ Co-secretaries, with input from the other faculty members teaching the system, are expected to decide upon course content, lecture schedules, course materials, and examination content and schedules. They submit their draft syllabi to the faculty curriculum committee and then to the executive council for revision and approval. However, the curriculum committee and executive council generally make only nonsubstantive "housekeeping" changes in the original documents. Thus, the faculty effectively determines the content and schedules of the systems taught at the College.

The faculty also participates in the formulation of the College's basic academic philosophies and policies. For example, the faculty was instrumental in the College's conversion from a 3-year to a 4-year course of study, and a faculty committee was directly responsible for the formulation of the expanded curriculum.⁹ Additionally, the faculty has been engaged in the planning process for a new animal care facility at the College.

The admissions committee, which includes six faculty members, two students, and the director of admissions *ex officio*, sets the College's admissions policy. Further, the admissions procedure requires that the entire faculty be involved in reviewing applications, interviewing candidates, and recommending for or against their admission. The final decision as to whether or not to admit a candidate is made by the dean for academic affairs. Dr. Walsh testified, however, that he adopts faculty recommendations 99 percent of the time.

Student academic standards are set and enforced by the student promotion and evaluation committee (SPEC), which consists of eight faculty mem-

³ The directors are all members of the board of trustees. They meet on a quarterly basis.

⁴ These include the nominating committee, animal care committee, bylaws committee, rank and promotion committee, tenure committee, graduate council, postgraduate education committee, research and grant committee, student promotion and evaluation committee, and affirmative education committee.

⁵ These include the admissions committee, curriculum committee, educational resources committee, clinic education committee, scholarship, honors, and awards committee, student financial aid committee, and student health committee.

⁶ These include anatomy, behavioral science, biochemistry, family practice, internal medicine, microbiology, nutrition, obstetrics and gynecology, osteopathic manipulative medicine, pathology, pediatrics, physiology/pharmacology, radiology, and surgery.

⁷ For example, the rheumatology and orthopedics system is taught over a 6-week period, and includes lectures in anatomy, biochemistry, physiology/pharmacology, rheumatology, microbiology, pathology, and orthopedics.

⁸ A system may have more than one co-secretary, depending upon its size.

⁹ Its draft course schedule was subject to approval by the board of trustees, which adopted it in full.

bers.¹⁰ This committee is responsible for evaluating performance, recommending promotions, and reviewing graduation requirements of students. In June 1979, SPEC established the COMS student evaluation mechanism, a comprehensive document which sets forth detailed attendance, examination, grading, probation, dismissal, and leave policies. SPEC also makes initial recommendations as to the discipline or dismissal of individual students. These recommendations are subject to the approval of the dean for academic affairs, the executive council, the full faculty and the board of trustees. However, there is no evidence that any SPEC recommendations have been reversed by the administration.¹¹

The faculty also has considerable influence in the hiring of its members. The discipline heads often initiate the hiring process by informing the dean for academic affairs of the need for new instructors and suggesting specific names of candidates. The discipline heads, in conjunction with other faculty members in their respective disciplines, are further responsible for screening all candidates and advising the dean and the college president as to their competence. No faculty member will be hired without the endorsement of the discipline head. However, the president has rejected a small number of faculty candidates recommended by discipline heads, because of high salary requirements or other onerous preconditions.

Pursuant to the collective-bargaining agreements and bylaws, a faculty committee has authority to effectively recommend the initial rank and subsequent promotions of faculty members. The rank and promotion committee, based on criteria set forth in detail in the collective-bargaining agreement, makes specific recommendations to the dean for academic affairs.¹² If approved by the dean, these recommendations are submitted to the president for final approval. Drs. Walsh and Azneer both testified that they view the committee's recommendation as the paramount consideration in their decisionmaking process.¹³ Additionally, the collective-bargaining agreement states that the initial rank of all incoming faculty members is subject to the committee's approval.

Similarly, the administration makes the final decisions on tenure for faculty members, but relies

heavily on the tenure committee recommendations.¹⁴ During the 1979-80 and 1980-81 school years, all six committee recommendations to grant tenure were effectuated by the administration.

It is evident from the record that the COMS faculty currently has almost plenary authority in academic matters and significant input into important nonacademic matters. The faculty is instrumental not only in the day-to-day operation of the College but also in its long-range policy planning. Moreover, faculty members have considerable influence over their colleagues' job security and advancement. In sum, the COMS faculty clearly has managerial authority as outlined in *Yeshiva*, and in subsequent Board decisions.¹⁵

The Union contends that the faculty does not have managerial authority because they do not make the final decision in many matters, but merely recommend a course of action which the administration is free to reject. However, the record indicates that faculty recommendations are almost always followed by the administration. As the Court found in *Yeshiva*,¹⁶ administration retention of final decisionmaking authority is not determinative of managerial status where the faculty retains managerial authority through its effective recommendations.¹⁷

The Union further contends that a unit should not be able to "bargain itself out of the protections of the Act." The Union asserts that the faculty's authority has been gained and maintained solely through an adversarial process of collective bargaining, and that faculty interests are not truly aligned with management, as contemplated by the Court in *Yeshiva*, *supra*. The Union fears that if the faculty were unprotected by a collective-bargaining agreement the Employer could unilaterally remove any managerial authority that the faculty has achieved through collective bargaining.

Although we recognize the concerns expressed by the Union, we are constrained to reject this contention. The Supreme Court was primarily concerned that a collective-bargaining relationship might cause college faculty members to divide

¹⁰ SPEC meetings are frequently attended by Dr. Walsh in an advisory capacity.

¹¹ The faculty was also responsible for establishing the College's test question challenge procedure. This procedure was set by an *ad hoc* committee of faculty members.

¹² Promotion proceedings are initiated by the faculty member's discipline head.

¹³ In fact, the record indicates that there have been several cases in which they disagreed with committee recommendations and sent them back for reconsideration. When the committee did not change its recommendation, the administration yielded to the committee's view.

¹⁴ This has not always been the case. In 1978, the committee recommended 12 faculty members for tenure. Of these, Dr. Azneer presented six to the board of trustees, who refused to grant tenure to any of them. After the faculty invoked the contractual grievance procedure, an arbitrator ordered the College to conduct the tenure reviews again.

¹⁵ See, e.g., *Montefiore Hospital and Medical Center*, 261 NLRB 569 (1982); *Ithaca College*, 261 NLRB 577 (1982); *Thiel College*, 261 NLRB 580 (1982); and *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982).

¹⁶ See 444 U.S. at 683, fn. 17, wherein the Court stated that "the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. . . . the relevant consideration is effective recommendation or control rather than final authority."

¹⁷ Also, see *Ithaca College*, *supra*.

their loyalties between their employers and unions. The *Yeshiva* decision does not expressly or impliedly distinguish situations in which managerial authority was gained through collective bargaining from situations in which such authority was more freely granted, and we do not believe that such a distinction is required by the Act. Accordingly, we must look to the extent of managerial authority held by college faculties rather than the manner in which such authority was obtained.

However, our determination that COMS faculty members are managerial employees not qualified for the protection of the Act is dependent on the particular facts of the current situation. If the College removes sufficient authority from its faculty members so that they revert to the status of non-managerial employees, the Board will process a proffered representation petition at that time.

The Employer's petition to exclude all COMS faculty members from the unit is hereby granted. In light of this decision we need not decide whether the discipline heads, clinic directors, library director, or biomedical communications director, all of whom are faculty members, should be excluded as supervisors. As the unit now includes no employees within the meaning of Section 2(3) of the Act, we will revoke the Union's certification.

ORDER

It is hereby ordered that the existing contractual collective-bargaining unit represented by College of Osteopathic Medicine and Surgery Faculty Federation, Local 3474, American Federation of Teachers, be, and it hereby is, clarified to exclude all employees in the unit. Accordingly, the Union's certification, issued in Case 18-RC-10663, is hereby revoked.